UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 06-22644-CIV-GOLD/McALILEY

CLIFFORD MONCRIEFFE and GLORIA MONCRIEFFE, his wife,

Plaintiffs,

v.

CLARK EQUIPMENT COMPANY, a foreign corporation d/b/a MELROE COMPANY; HERTZ EQUIPMENT RENTAL CORPORATION, a foreign corporation,

Defendants.
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OMNIBUS ORDER ON MOTIONS IN LIMINE

THIS CAUSE comes before the Court upon the following motions *in limine:* (1) Plaintiffs' Motion Regarding Cause of Tipover [DE 242]; (2) Defendant's Motion to Bar Testimony of Jeffrey Warren [DE 246]; (3) Plaintiffs' Motion to Exclude OSHA File [DE 247]; (4) Defendant's Motion to Preclude Other Accidents of Bobcat Compact Excavators X320 ("Bobcat 320") [DE 250]; (5) Defendant's Motion Regarding ISO 3471 and ISO 12117 [DE 252]; and, (6) Defendant's Motion Regarding Post-Sale Failure to Warn [DE 261]. The parties have filed responses and replies, as well as several exhibits in support of their arguments, and I held a day long hearing on all matters. Following the hearing, the parties filed supplemental briefs on several discrete issues discussed during oral argument. These motions are now ripe for my consideration.

I. Applicable Law

This case is before me on diversity jurisdiction pursuant to 28 U.S.C. § 1332;

therefore, Florida substantive law apply. *See Jones v. United Space Alliance, LLC*, 494 F.3d 1306, 1309 (11th Cir. 2007) ("[W]e apply substantive Florida law to state claims heard on the basis of supplemental jurisdiction."). The Eleventh Circuit has explained that in applying state law, "[i]n the absence of definitive guidance from the Florida Supreme Court, we follow relevant decisions from Florida's intermediate appellate courts." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1231 (11th Cir. 2004) (citing 17A James Wm. Moore, et al., *Moore's Federal Practice* § 124.22[3]. 124-87, 124-88). Florida District Courts of Appeal are the law of Florida unless and until overruled by the Florida Supreme Court. *Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992). Thus, "[a] federal court applying state law is bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg v. Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983) (citations omitted). Only "[i]n the absence of precedents from Florida's intermediate appellate courts ... may [we] consider the case law of other jurisdictions that have examined similar [issues]." *State Farm Fire,* 393 F.3d at 1231. The objective is for the Federal Court to determine the issues of state law as it believes the Florida Supreme Court would.

However, even in diversity cases, federal rules apply to procedural matters. *Heath v. Suzuki Motor Corp*., 126 F.3d 1391, 1396 (11th Cir. 1997). It is well-established that rulings on evidentiary matters are procedural in nature, and are therefore governed by the Federal Rules of Evidence. *Id*. ("Under this circuit's controlling precedent regarding diversity jurisdiction cases, the admissibility of evidence is a procedural issue, and

therefore is governed by the Federal Rules of Evidence."). State law may assist a district court in defining what evidence is material to an issue. *Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1306 (11th Cir. 1999) ("The admissibility of evidence in a federal action is governed by the Federal Rules of Evidence, not state law. Nonetheless, state law may assist in defining what evidence is material to an issue...").

II. Standard of Review

District courts have wide discretion in determining the relevance of evidence produced at trial. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005) (citing See *United States v. Kopituk*, 690 F.2d 1289, 1319 (11th Cir. 1982)). In general, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Fed. R. Evid. 402. The Federal Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if a party meets the low threshold of relevancy, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...". Fed. R. Evid. 403. Under the guidance of these general principles, I review the pending motions in this case.

III. Analysis

1. Plaintiffs' Motion Regarding Cause of Tipover

Plaintiffs seek to exclude references regarding any act or omission on Clifford Moncrieffe's part that allegedly caused the Bobcat 320 to tipover at the time of the accident

because allegations that Clark was liable for designing the machine in a manner that made it prone to tipping have been withdrawn. According to Plaintiffs, Defendant Clark should be precluded from suggesting that Mr. Moncrieffe was comparatively negligent in causing the tipover because, under Florida law, the cause of the initial accident is not an issue in a crashworthiness design defect case such as this one.[1]

Plaintiffs argue that the only design defect alleged is the Bobcat 320's failure to protect occupants from a crush injury in the event of a foreseeable tipover accident. They contend that because the cause of the tipover is irrelevant, Mr. Moncrieffe's alleged negligence in causing the initial accident is inadmissible.[2] Defendant responds that this is not a "crashworthiness" case for several reasons, including: (a) Plaintiffs did not allege a crashworthiness claim in their complaint;[3] (b) Plaintiff Clifford Moncrieffe was not using an

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[1] Plaintiffs concede that whether Mr. Moncrieffe misused the equipment by not wearing a seatbelt is a valid issue for the jury to decide, as the use of a seatbelt is casually connected to the enhanced injuries alleged and the defense of comparative negligence as to whether Mr. Moncrieffe was wearing a seatbelt is relevant. For this reason, Plaintiffs' motion only addresses the issue of comparative negligence as to the cause of the tipover itself.

[2] Plaintiffs add that Defendant is only liable for the enhanced injuries that resulted from its failure to protect the occupant from the crush injuries, and not for the injuries that would have resulted from the initial tipover.

[3] In their Amended Complaint, Plaintiffs have alleged that the Bobcat 320 "lacked a sufficient device or structure to keep the operator's arms and legs inside the vehicle in the event the excavator tipped over or rolled" (Am. Compl., ¶ 25). Plaintiffs have alleged that the tipover was a foreseeable event, *id.,* that Defendant breached its duty of care when it, among other things, failed to manufacture the Bobcat 320 "with proper and appropriate safety device or structure to keep the operators legs inside the excavator if tipping were to occur," *id*. at ¶ 33(d), and that Defendant manufactured the Bobcat 320 defectively by failing to design such a safety device., *id*. at ¶ 40. These allegations are sufficient to plead an enhanced injury claim.

automobile or vehicle;[4] (c) there was only one accident in this case; and, (d) Plaintiff's conduct in misusing the Bobcat, and not the conduct of some third party, caused the accident.

The Florida Supreme Court first recognized the crashworthiness doctrine in *Ford Motor Co. v. Evancho*, 327 So.2d 201 (Fla. 1976) when it held that a "manufacturer must use reasonable care in design and manufacture of its product to eliminate unreasonable risk of foreseeable injury." *Id*. at 204 (adopting the crashworthiness doctrine enunciated by the *Larsen* court). Crashworthiness cases, also known as "secondary collision" or "enhanced injury" cases,

> involve both an initial accident and a subsequent or secondary collision caused by an alleged defective condition created by a manufacturer, which is unrelated to the cause of the initial accident but which causes additional and distinct injuries beyond those suffered in the primary collision. One court has explained that the damages sought in such cases are not for injuries sustained in the original collision but for those sustained in the second impact where some design defect caused an exacerbated injury which would

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[4] During oral argument, Defendant conceded that Florida courts have applied the doctrine to situations that did not involve automobile manufacturers, such as motorcycle manufacturers and pleasure boat manufacturers. *See, e.g., Nicolodi v. Harley-Davidson Motor Co.*, 370 So.2d 68, 71 (Fla. 2d DCA 1979) (stating that "the crashworthiness doctrine is simply an aspect of basic principles of negligence and we have no difficulty in finding that these principles extend to motorcycle manufacturers as well as to automobile manufacturers. ... Foreseeability is the conceptual cornerstone of the crashworthiness doctrine."). Defendant further concedes that although neither party could find a case extending the doctrine to construction equipment, case law does not preclude the application of the doctrine to the Bobcat 320. *See id.* at 71 ("The *Larsen* [*v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968)] court specifically rejected the notion that it was placing automobile manufacturers in a special class, saying '[w]e think the duty of the use of reasonable care in design to protect against foreseeable injury to the user of a product and perhaps others injured as an incident of that use should be and is equally applicable to all manufacturers with the customary limitations now applied to protect the manufacturer in case of unintended and unforeseeable use.'"). Therefore, the fact that the incident did not involve an automobile is irrelevant.

not have otherwise occurred as a result of the original collision.

D'Amario v. Ford Motor Co., 806 So.2d 424, 426 (Fla. 2002) (internal quotations omitted). Nearly twenty years after adopting the doctrine, the Florida Supreme Court addressed the issue of whether principles of comparative fault concerning the initial accident apply in crashworthiness cases. *Id.*

In *D'Amario,* the Florida Supreme Court acknowledged that there is a national split as to the issue of whether comparative negligence is an available defense in crashworthiness cases. *Id.* at 431-34. The majority view holds that "the fault of the plaintiff or a third party in causing the initial accident is recognized as a defense to a crashworthiness case against a product manufacturer." *Id.* at 432. The court explained that the "majority view is based on the belief that the fault of the defendant and of the plaintiff should be compared with each other with respect to all the damages and injuries for which the conduct of each party is a cause in fact and a proximate cause." *Id.* (quoting *Whitehead v. Toyota Motor Corp*., 897 S.W.2d 684 (Tenn. 1995)).

On the other hand, the "minority view" rejects the "the application of comparative fault principles, [and] focuses on the underlying rationale for imposing liability against automobile manufacturers for secondary injuries caused by a design defect." *Id.* at 433 (citing *Cota v. Harley Davidson,* 141 Ariz. 7, 684 P.2d 888, 895-96 (Ariz. Ct. App. 1984) (holding that evidence of the plaintiff's intoxication and conduct in causing the initial accident was not relevant in a crashworthiness case against a motorcycle manufacturer based on a design defect in the motorcycle's gas tank system); *Andrews v. Harley Davidson, Inc.,* 106 Nev. 533, 796 P.2d 1092, 1095 (Nev. 1990) (holding that evidence of

plaintiff's intoxication on night of accident was not relevant to whether motorcycle manufacturer's design defect proximately caused plaintiff's injuries); *Green v. Gen. Motors Corp*., 709 A.2d 205, 212-13 (N.J. Super. Ct. App. Div. 1998) (holding that plaintiff's excessive speed was not relevant to issue of defective design but was relevant to issue of proximate cause of injuries)). Courts that have adopted this view have explained the rationale as follows:

> The crashworthiness doctrine imposes liability on automobile manufacturers for design defects that enhance, rather than cause, injuries. The doctrine applies if a design defect, not causally connected to the collision, results in injuries greater than those that would have resulted were there no design defect. The issue for purposes of a crashworthiness case, therefore, is enhancement of injuries, not the precipitating cause of the collision.

Id. After discussing both views, the Florida Supreme Court adopted the minority view, and held that "principles of comparative fault concerning apportionment of fault as to the cause of the underlying crash will not ordinarily apply in a crashworthiness or enhanced injury case." *Id*. at 426. The court explained that

> [b]ecause the manufacturer alleged to be responsible for a defective product that results in a second accident and injury ordinarily may not be held liable for the injuries caused by the initial accident, the fault of the manufacturer may not be compared or apportioned with the fault of the driver of the vehicle who allegedly caused the initial crash.

Id. Nonetheless, the court recognized "that in some cases a valid issue may exist as to whether the plaintiff's negligence contributed to the cause of the enhanced injuries [so that] the... manufacturer should be permitted to assert that plaintiff's negligence was a legal cause of the enhanced injuries." *Id.* at 426, n. 2. The court added that "comparative fault may be raised if the circumstances require that there be a fair and just allocation of fault and damages," and that "the misuse of a product has been recognized as a defense in

product liability actions" *Id*. at 440, n. 16.

Neither the Florida Supreme Court nor any of the state's intermediary courts of appeals have spoken definitely on the issue of whether the comparative negligence of the plaintiff in the underlying accident is relevant in a crashworthiness case. While the *D'Amario* court acknowledged that several courts that have adopted the minority view have excluded the plaintiff's fault in the underlying accident, *see*, *e.g., Cota,* 684 P.2d at 895-96; *Andrews,* 796 P.2d at 1095; and *Green,* 709 A.2d at 212-13, *supra* p. 3, the Court only addressed the question of whether the negligence of a *third party* should be admitted, and Florida courts have been debating the extent of the *D'Amario* holding since its issuance. *See, e.g., Sta-Rite Indus., Inc. v. Levey,* 909 So.2d 901 (Fla. 3rd DCA 2004) (acknowledging that "the extent of the separate accidents-separate defenses holding of *D'Amario* has been roundly debated...").

In their supplemental briefs, both sides concede that there is no Florida case in which *D'Amario* was applied to an accident involving a single vehicle/operator where the fault of a third party was not at issue, and my independent review of Florida case law has not revealed any such cases. In addition, each side has presented conflicting cases on the issue from various courts. *See, e.g., Andrews v. Harley Davidson*, 796 P.2d 1092 (Nev. 1990) (holding that the jury needed to focus on the defective product and not the consumer's negligence because "Andrews' intoxication may have been the proximate cause of the *accident*; [h]owever, Harley Davidson's design, if it was as defective as Andrews contends, was the proximate cause of his *injuries*."); *but cf. Doupnik v. Gen. Motors Corp.*, 225 Cal. App. 3d 849, 865-66 (Cal. App. 1990) (holding that "[t]he doctrine

of comparative fault is applicable to crashworthiness cases" where the plaintiff was drunk and drove his car off a steep incline). Most of these cases are not particularly helpful to me. First, the three cases relied on by Defendant have been issued by courts that adhere to the majority view that comparative negligence is a defense in a crashworthiness case, but the *D'Amario* court explicitly stated that Florida adopts the minority view, which rejects the application of comparative fault principles, [and] focuses on the underlying rationale for imposing liability against ... manufacturers for secondary injuries caused by a design defect." *D'Amario*, 806 So.2d at 433, 435. Second, of the cases relied on by Plaintiffs, only two discuss whether comparative negligence is an available defense in crashworthiness cases.[5] *See Alami v. Volkswagen of Am., Inc.*, 766 N.E.2d 574, 577 (N.Y. 2002) (holding that evidence as to the comparative negligence of the intoxicated driver/plaintiff was barred by the crashworthiness doctrine)[6]; *Giannini v. Ford Motor Co.,* No. 05-244, 2007 WL 3253731 (D. Conn. Nov. 2, 2007) (ruling that the cause of a single vehicle accident was irrelevant to determining whether a seatbelt was defective, and stating that "negligent operator is entitled to the same protection against unnecessary injury as the

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[5] In addition, *Andrews v. Harley Davidson, Inc.*, 796 P.2d 1092 (Nev. 1990), discussed whether contributory negligence was defense to a *strict liability claim* which does not require a showing of the manufacturer's negligence.

[6] In *Alami*, a heavily intoxicated driver ran his car into a pole. 766 N.E.2d at 575. The plaintiff alleged that the lack of easily included safety devised caused the driver's fatal post-collision injuries. New York's highest court agreed with the plaintiff that injuries claimed did not have a casual link to the decedent's violation of the law, and that if the manufacturer had defectively designed the car, it had breached a duty to any driver involved in a crash, regardless of the initial cause of the crash. *Id.* at 576-77.

careful user.")[7]. These cases are consistent with the acknowledgment in *D'Amario* that several courts that follow the minority view do not distinguish between cases in which the initial accident was caused by the plaintiff or a third party. However, they do not shed light on the issue of whether the Florida Supreme Court would concur with those jurisdictions that have found that when the case involves a single operator who is allegedly comparatively negligent in causing the accident, the legal analysis is the same as a case involving a negligent third party. For reasons that I will explain, I do not decide the issue in this Order. I do, however, offer several observations.

First, Florida courts have defined accident broadly, and do not necessarily require "secondary collision" for the doctrine to apply. *See, e.g., Nicolodi*, 370 So.2d at 71 (stating that the doctrine does not require a primary and secondary "collision", and that injuries inflicted by forces or objects extraneous to the motorcycle were sufficient). Second, Florida courts have refused to apply the doctrine in cases where the plaintiff has suffered indivisible injuries. *See, e.g., Sta-Rite Indus., Inc. v. Levey,* 909 So.2d 901 (Fla. 3rd DCA

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[7] *Giannini* involved a single vehicle crash where the plaintiff's negligent operator of his vehicle caused it to run into a pole. 2007 WL 3253731 at *1. Plaintiff sued the automobile's manufacturer, alleging that crashworthiness defects in the brakes and safety restraint systems lead to her enhanced injuries. The court identified the issue as the following: whether plaintiff's comparative negligence in causing the collision is relevant to apportioning liability for his alleged enhanced injuries. The District of Connecticut, applying Connecticut law, stated that a negligent operator involved in a single vehicle crash is "entitled to the same protection against unnecessary injury as a careful user," *id.* at * 3, and ruled that evidence of the plaintiff's comparative evidence was inadmissible. *Id.* at *1. The *Giannini* court discussed the national split of authority as to whether the plaintiff's negligent conduct leading to the underlying accident should be a subject of comparative fault in determining liability for increased harm. The court concluded that evidence of the plaintiffs' negligence will be admitted if it relates to the cause of the enhanced injuries, but excluded if it relates to the cause of the collision.

2004) (refusing to apply the *D'Amario* rule when " the same indivisible injuries were claimed to have resulted from both" accidents); *Jackson v. York Hannover Nursing Ctrs.*, 876 So.2d 8, 11-12 (Fla. 5th DCA 2004) (refusing to apply the *D'Amario* rule in a medical negligence action because, rather than involving two separate and distinct injuries, the medical center and the nursing "were dealing with a continuum of the same injury.*"*). In *Sta-Rite Industries, Inc.,* the plaintiff was injured when he stuck his hand in a pool drain. He alleged that his injuries were caused by two accidents: his arm being caught in the drain, and the drain's failure to release his arm. *Id.* at 906. The court disagreed, and stated:

> While the extent of the separate accidents-separate defenses holding of *D'AMARIO* has been roundly debated, there is no case or other authority which even suggests its applicability to a situation like this one, in which neither logic nor common sense would permit an artificial division of the causation of the plaintiff's damages into separate indistinguishable seconds-long intervals during all of which he remained in the same dangerous position. In other words, no rational person could find, as the jury was told it must, that the failure of Segal and All Florida to secure the grate or to provide ready access to an available means to turn off the pump had nothing to do with Lorenzo's ultimate condition. The point is made in *Jackson v. York Hannover Nursing Centers*, 876 So.2d 8 (Fla. 5th DCA 2004). There, even though, unlike this case, two arguably separate incidents were involved, the court held that *D'AMARIO* did not apply when, like this case, the same indivisible injuries were claimed to have resulted from both of them.

Id. at 908.

As to the rest of Defendant's arguments, I conclude that the relief requested in this motion seeks much more than a pretrial evidentiary ruling. *See Hi Ltd. P'hip v. Winghouse of Fla., Inc.,* Case No. 03-116-22, 2004 WL 5486964, * 13 (M.D. Fla. Oct. 5, 2004); *Saunders v. Alois*, 604 So.2d 18, 19-20 (Fla. 4th DCA 1992) (reversing the trial court's ruling because "the motion in limine was in essence a substitute for a motion for partial summary judgment on a portion of the damage claim of appellant."). There are material

factual issues in dispute that prevent me from making a determination as a matter of law of whether the this case involves one or two accidents. As the Honorable James L. King stated in *Roberts v. National Life Ins. Co.*, 105 F.R.D. 492 (S.D. Fla. 1985)

> Consideration of evidentiary rulings on an item by item, piecemeal, basis is counter-productive to the effective administration of justice in a busy trial court. When these rulings are made at the time the exhibit is offered in evidence, the trial judge has the benefit of full development of all relevant facts constituting the introductory predicate for admission of the item or statement. Motions in limine rarely provide this factual background.

Id. at 492. I thus find it prudent to allow the jury to decide whether this case involves two distinct accidents: (1) the tipover; and, (2) the crush injuries; or whether the injury is indivisible.

Rather than precluding Defendant from raising this affirmative defense, the parties should be allowed to argue the relevancy of the cause of the tipover and whether the accident and injury are divisible. *See* Fed. R. Civ. P. 104(b) ("When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."). The verdict form can provide a mechanism to assure that the jury's verdict is consistent with its findings. Finally, I reserve the right to enter judgment as a matter of law upon the appropriate motion, if applicable. For this reason, Plaintiffs' Motion Regarding Cause of Tipover is DENIED without prejudice.

2. Defendant's Motion to Bar Testimony of Jeffrey Warren

Plaintiffs intent to proffer Jeffrey Warren as an expert on matters of mechanical engineering, and machine design and safety. Defendant seeks to bar the testimony of Plaintiff's sole expert, Dr. Warren, on the following bases: (1) he is not qualified to render

expert testimony on the disclosed subjects of mechanical engineering, machine design, or machine safety; (2) his opinions are unreliable and do not meet the law's strict standards for expert witnesses; and, (3) his opinions will likely be cumulative and not assist the trier of fact.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), the Supreme Court held that Rule 702 compels district courts to perform a critical "gatekeeping" function concerning the admissibility of expert scientific evidence. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*). Subsequently, the Supreme Court held that courts are required to play the same gatekeeping function when considering the admissibility of technical or other specialized expert evidence. *Id.* (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142, 119 S. Ct. 1167, 1174, 143 L. Ed. 2d 238 (1999)). Nonetheless, district courts have broad discretion in deciding to admit or exclude expert testimony. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997).

Under the law of this Circuit, to determine the admissibility of expert testimony, district courts engage in a rigorous three-part inquiry to consider whether: "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the

methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Frazier*, 387 F.3d at 1259 (citing *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998) (citing *Daubert*, 509 U.S. at 589)). The proponent of expert testimony bears the burden to show, by a preponderance of the evidence, that the requirements have been met. *Id.* (quoting *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002)).

i. Requisite Qualification

An expert can be qualified in various ways. "While scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status." *Frazier*, 387 F.3d at 1260-61; Rule 702 (providing that expert status may be based on "knowledge, skill, experience, training, or education"). Several courts have held that "an expert's training does not always need to be narrowly tailored to match the exact point of dispute in a case." *McGee v. Evenflo Co.*, Case No. 02-259, 2003 U.S. Dist. LEXIS 25039, *8 (M.D. Ga. Dec. 11, 2003); *see Stagl v. Delta Air Lines Inc.,* 117 F.3d 76, 82 (2d Cir. 1997) (proffered expert was qualified under Rule 702 despite his lack of first-hand experience with the particular machinery at issue); *Lovato v. Burlington N. & Santa Fe R.R. Co.*, Case No. 00-2584, 2002 U.S. Dist. LEXIS 16844, ** 12-13 (D.Colo. June 24, 2002) (expert's lack of professional experience with the railroad industry was not dispositive as to the issue of his qualifications to serve as an expert); *Colon v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 75-79 (S.D.N.Y. 2001) (expert's training need not narrowly match

the point of dispute in the case); *Lichter v. Case Corp.*, Case No. 99-4260, 2001 WL 290615 (N.D. Ill. 2001) (expert's significant experience in the field of mechanical engineering, his engineering research and design background rendered him an expert to testify as to the safety of a skid steer loader's design despite his lack of experience in the narrow area of skid steel loaders); *Exum v. Gen. Elec. Co.,* 260 U.S. App. D.C. 366 (D.C. Cir. 1987) (district court abused discretion in excluding testimony of registered engineer who had considerable experience with issues of industrial safety and product design, notwithstanding that he had no specific expertise in kitchen design and had never examined kitchen of fast food restaurant, since Rule 702 does not require expert to have personal familiarity with subject but rather "experience" is only one among five different ways to demonstrate expert is qualified).

Plaintiffs seek to qualify Dr. Warren as an expert in mechanical engineering and machine design and safety. Dr. Warren has a Bachelor of Science in Mechanical Engineering and a Master of Science in Mechanical Engineering from the Virginia Polytechnic Institute and State University, and a Doctor of Philosophy in Mechanical Engineering (Ph.D.) from the University of North Carolina at Charlotte. (*See* Curriculum Vitae Jeffrey H. Warren, DE 299 at Ex. A; Warren Depo., DE 245 at 8:4-7). Dr. Warren is a registered professional engineer in twelve states, including Florida. (Curriculum Vitae, DE 299 at Ex. A). He has extensive experience in machine design jobs at Lockheed-Georgia Company, Cummins Engine Company, Rockwell International, Adler Instruments, Union Carbide Corporation, and E.I. Du Pont de Nemours & Co., Inc. (*Id.*).

Dr. Warren has worked as a research engineer, a research supervisor of mechanical development involved in the design and specification of equipment, and as the

project engineer involved in the design and manufacture of specialized machinery. (*Id.*). As Defendant points out, in 1980 Dr. Warren started a company called Warren Engineering Co, Inc. to design and build special machinery. (Motion to Exclude Expert, DE 246 at p. 6). From 1983 to 1987 Dr. Warren was the President and Chief Machine Designer of Warren Engineering Co, Inc., and was responsible for the design and fabrication of complete machines. (Curriculum Vitae, DE 299 at Ex. A). Since 1987, Dr. Warren has been a consulting engineer specializing in design, analysis, failure analysis and accident reconstruction for manufacturing facilities, attorneys, insurance companies and insurance adjusters. (*Id.*). From 1988 to the present, Dr. Warren has also been the CEO and Chief Engineer of the Warren Group, performing consulting and training related to property loss analysis and personal injuries involving engineering machine design and safety. (*Id.*). In addition, from 1987 through 1992, Dr. Warren investigated claims and accidents while working at Engineering Design & Testing. (Motion to Exclude Expert, DE 246 at p. 6). He has published and presented numerous articles and papers, and he maintains membership in professional engineering associations including the American Society of Mechanical Engineers and the American Society of Safety Engineers. (Curriculum Vitae, DE 299 at Ex. A). Additionally, Dr. Warren has been an associate professor of engineering at the University of South Carolina. (Motion to Exclude Expert, DE 246 at p. 6).

Dr. Warren has been qualified as a mechanical engineering expert in several cases, including cases involving Bobcat's skid steer loaders, Mustang skid steer loaders, tire and track mounting backhoes, bulldozers and tractors, and other construction equipment. (Warren Depo., DE 245 at pp. 28-30). He has testified in numerous machine safeguard cases over the last twenty years, and has never been disqualified as an expert witness.

(*Id.* pp. 39, 40, 151). Based on these qualifications, there can be no dispute that Dr. Warren is a qualified expert in the fields of general mechanical engineering and machine design and safety. In fact, Defendant concedes that Dr. Warren has been qualified as such numerous times.

Defendant nonetheless argues that Dr. Warren does not have the requisite training, experience, or education in the subjects of mechanical engineering and machine design and safety because he never participated in the analysis, engineering, design or considerations of any operating systems for any "compact excavator." Specifically, Defendant notes that Dr. Warren: (1) has never consulted in any area of design analysis or appraisal of machinery concerning compact excavators; (2) has never participated in the analysis, engineering, design, re-design, or consideration of any operating systems on compact excavators; (3) other than what he has done in this case, has no experience operating a compact excavator; (4) does not hold himself out to be an expert in the operational protocol of material handling equipment; (5) has never analyzed a tip-over of a compact excavator before he became involved in this case; (6) has never been retained by any manufacturer to analyze the design of compact excavators; and (7) has never written, nor published, any articles regarding design criteria for compact excavators or otherwise dealing with the design of compact excavators. (Motion to Exclude Expert, DE 246 at p. 7). However, as numerous courts have previously held, the fact he has not, prior to this case, applied his expertise to the narrow issue of 'compact excavators' does not warrant a finding that he is not qualified to testify as an expert in this case. Whatever shortcomings Defendant perceives in Dr. Warren's academic or professional background can be properly addressed in cross-examination. *Cf. Lovato*, 2002 U.S. Dist. LEXIS 16844

at *13 (“Whatever shortcomings Burlington Northern may perceive in Mr. Wick's academic or professional background are more properly addressed in cross-examination”) (citing *Daubert*, 509 U.S. at 596 ("[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence")). I therefore conclude that Dr. Warren is qualified to testify competently regarding the matters he intends to address.

ii. Reliable Methodology

As the gatekeeper, district courts must ensure that speculative and unreliable opinions do not reach the jury. *Calta v. N. Am. Arms, Inc.*, Case No. 05-1266, 2007 U.S. Dist. LEXIS 96116, * 8 (M.D. Fla. Nov. 27, 2007). Therefore, district courts must assess “whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue.” *Daubert*, 509 U.S. at 592-92. The Notes of the Advisory Committee on Rule 702 explain that “*Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony.” (Fed. R. Evid. 702 advisory committee’s notes). In deciding whether deciding whether the requirements of Rule 702 are met, “*Daubert* instructs courts to consider the following factors: (1) whether the expert’s theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.” *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. Fla. 2002) (quoting *Daubert*, 509 U.S. at 593-94). In *Kumho*, the Supreme Court held that

these factors may also apply in assessing the reliability of technical expert testimony depending upon "the particular circumstances of the particular case at issue." *Kumho*, 526 U.S. at 251-52. These factors are illustrative, not exhaustive; and, the court is free to consider the ones which are relevant to the case before them, keeping in mind that not all of the factors will apply in every case. *Kumho*, 526 U.S. at 137, 150-52 The Notes of the Advisory Committee have acknowledged that "[a] review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." (Fed. R. Evid. 702 advisory committee's notes). There are no bright rules in this area, and district courts have substantial discretion in deciding how to test an expert's reliability. *United States v. Majors*, 196 F.3d 1206, 1215 (11th Cir. 1995).

In alternative design cases, some courts have suggested that the following factors should be considered to determine reliability: 1) federal design and performance standards such as OSHA; 2) standards established by independent standards organizations such as ANSI; 3) relevant literature; 4) evidence of industry practice; 5) product design and accident history; 6) illustrative charts and diagrams such as a drawing of the alternative design; 7) data from scientific testing; 8) the feasibility of the suggested modification; and 9) the risk-utility of the suggested modification. *See Martinez v. Altec Indus.,* Case No. 02-1100, 2005 U.S. Dist. LEXIS 46451, *19 (M.D. Fla. Aug. 3, 2005) (discussing the factors announced in *Milanowicz v. The Raymond Corp*., 148 F. Supp. 2d 525, 532-36 (D.N.J. 2001)). Further, several "courts have excluded expert testimony regarding a safer alternative design where the expert failed to create drawings or models or administer tests." *Id.* (citing *Zaremba v. Gen. Motors. Corp*., 360 F.3d 355, 358 (2d Cir. 2004); *Bourelle v.*

Crown Equip. Corp., 220 F.3d 532, 536-38 (7th Cir. 2000); *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991-92 (5th Cir. 1997); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996)). However, where the proposed alternative design has been produced and put to practical use in the industry, the expert does not need to personally test it to satisfy *Daubert. See, e.g., Hodges v. Mack Trucks Inc.*, 474 F.3d 188 (5th Cir. 2006) (finding expert's opinion reliable, and not speculative, notwithstanding his failure to test the alternate design for a cab that pulled trailers, since the alternative latch was already in use in fire trucks); *Altman v. Ingersoll-Rand Co.*, Case No. 05-956, 2008 WL 596066 (W.D.Pa. 2008) (since alternative design was being used in machines of competitors, expert did not have to personally test it); *Weese v. Black & Decker, Inc.*, 2007 WL 4618526 (W.D.Mo. 2007) (holding that plaintiff's expert did not need to test alternate design where the design involved a lock feature that is simple, generally accepted, and incorporated in other products on the market); *Robinson v. Crown Equip. Corp.*, Case No. 02-00084, 2006 WL 897669 (E.D. Ark. 2006) (expert need not have to personally test his alternative design of a forklift designed with a closed operator compartment to prevent leg injuries because such design was not novel and was accepted by the engineering community); *Van Den Eng v. The Coleman Co., Inc.*, Case No. 03-C-504, 2006 WL 1663714, at *12 (E.D. Wis. 2006) (arguing that testing is less critical when the expert is applying "existing technology to an existing product" and not putting forward novel theories)*; Torbit v. Ryder Sys., Inc.*, 2001 WL 36102782 (E.D.Mo. 2001) (holding that plaintiff's expert's opinion was admissible even though the alternative design system had not been tested where the safety system had already been developed and used in the car hauling industry); *Brown v. Crown Equip.*

Corp., 181 S.W.3d 268, 278 (Tenn. 2005) (need for testing is diminished when alternative design is on the market); *Hoy v. DRM, Inc.*, 2005 WY 76, 114 P.3d 1268, 1279 (Wyo. 2005) (holding that district erred in requiring testing regardless of feasibility when experts applied "well-known and accepted engineering principles").

Taking these factors into consideration, I find that Dr. Warren's the methodology underlying his testimony is reliable and can be applied to the facts at issue. First, Dr. Warren has identified and discussed relevant design safety standards. *Cf. Milanowicz,* 148 F. Supp. 2d at 533 ("At the outset, courts scrutinizing expert testimony should look to see if the expert has identified and discussed any relevant federal design or performance standards... [and] whether the expert has referenced standards published by independent standards organizations..."). Second, Dr. Warren has proposed an alternative design based on an accepted industry practice to design these types of machine with a safety device that keeps the operator's legs from extending outside the main compartment or "house". *Id.* ("Another important indicia of reliability is industry practice-whether other manufacturers and consumers in the industry utilize the allegedly defective design or the proposed alternative."). Third, Dr. Warren has reviewed the available history of other accidents involving the Bobcat 320. *Id.* Fourth, Dr. Warren conducted a hazard analysis and risk assessment and determined that the risk of the an operator sustaining a crush injury in the even of a tipover was, in his expert opinion, unacceptable. Fifth, Dr. Warren has provided diagrams of his alternative design. While he prepared drawings of the alternative designs, he did not test their feasibility because, as discussed during oral argument, the design has been implemented and is already in use in the marketplace. I concur with the cases discussed above that have found that when the alternative design

is in existence in the industry the expert need not test is personally, and conclude that the failure to personally test or create a physical version of the alternative design does not warrant exclusion of Dr. Warren's expert opinions in this case.

Plaintiff's theory is that regardless of how the accident occurred, the machine is defectively designed because the lower extremities of an operator can extend outside the main compartment even if the operator is properly seatbelted. On the other hand, Defendant contends that if an operator is wearing the seatbelt, his legs cannot extend outside of the machine, and thus dispute Mr. Moncrieffe's testimony that he was wearing his seatbelt at the time of the incident. Defendant now argues that Dr. Warren's inspection of the Bobcat 320 is unreliable because he did not try to recreate the accident, and instead remained in a flat surface while he "intentionally twisted and contorted himself to get his foot outside of the Bobcat." (Motion to Exclude Expert, DE 246 at p. 9). However, Rule 702 does not require that Dr. Warren recreate a dangerous accident to prove his that a properly seatbelted operator can extend his legs outside of the house of the excavator. Moreover, as Plaintiffs' argued during oral argument, in preparing his opinion, Dr. Warren took the same steps taken by Defendant's expert, Carmen Lynnes, whom Defendant proffers meets all the requirements of Rule 702.

In sum, Dr. Warren's proposed testimony in this case is based on his knowledge of engineering and his related experience in design and manufacturing of machine safeguarding. Just as Defendant's expert Carman Lynnes, Dr. Warren reviewed and operated the Bobcat 320 involved in the accident, reviewed the relevant depositions, the owner's manual and operator's guide, and reviewed the applicable ISO and SAE safety standards for the subject excavator. In addition, Dr. Warren has created two alternative

designs to control the risk of crush injuries, and has provided drawings of these designs. Taking all these factors into consideration, I conclude that Dr. Warren's methodology underlying the his testimony is reliable and can be applied to the facts at issue. *See Daubert*, 509 U.S. at 592-92.

iii. Assist Trier of Fact

The third prong of the Rule 702 analysis is to determine whether the expert testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or determine a fact in issue. *Frazier*, 387 F.3d at 1259. To satisfy this requirement, expert testimony must concern matters that are beyond the understanding of the average layperson. *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985) (expert testimony admissible if it offers something "beyond the understanding and experience of the average citizen."). "Expert testimony is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend themselves." *Hibiscus Assoc. Ltd. v. Bd. of Tr. of Policemen & Firemen Ret. Sys. of City of Detroit*, 50 F.3d 908, 917 (11th Cir. 1995). In addition, expert testimony must be sufficiently related to the issues in the particular case and not confuse the trier of fact in resolving the dispute. *Daubert,* 509 U.S. at 591.

An expert opinion may be based on assumed facts if there is some support of such assumptions in the record. *See generally Norfolk S. Corp. v. Chevron U.S.A., Inc.,* 279 F. Supp. 2d 1250, 1269 (M.D. Fla. 2003); *see also Richman v. Sheahan,* 415 F. Supp. 2d 929, 942 (N.D. Ill. 2006) ("There is a critical distinction between an expert testifying that a disputed fact actually occurred or that one witness is more credible than another and an

expert giving an opinion based upon factual assumptions, the validity of which are for the jury to determine. The former is manifestly improper, the latter is not"). While "[r]elevant testimony from a qualified expert is admissible only if the expert knows of facts which enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation[,]" *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988), "absolute certainty is not required. Expert testimony is admissible which connects conditions existing later to those existing earlier provided the connection is concluded logically." *Id.*

Defendant argues that Dr. Warren's testimony is not helpful to the jury because it merely recites the circumstances of Mr. Moncrieffe's injury and misleads the jury by suggesting that the expert was present when the incident occurred. Defendant's attempt to exclude the testimony by arguing that the jury will be mislead is wholly without merit: Dr. Warren can be asked, during cross-examination, whether he was present and can be impeached if he does not answer truthfully. In addition, Dr. Warren is not going to merely recite the circumstances of the accident. While he will base his opinion, in part, on the testimony of Mr. Moncrieffe and Mr. Pedro Diaz, one of the two individuals who first responded to the scene, he is also going to testify about applicable ISO and other safety standards, and about an alternative design which, in his expert opinion, would have prevented the injuries.

Moreover, Dr. Warren is not being offered as a reconstruction expert and is not expected to testify as to how the accident happened. While the series of events as described by Mr. Moncrieffe and other witnesses offered by Plaintiffs is at odds with Defendant's version, there is support in the record for Dr. Warren's factual assumptions. For these reasons, I conclude that Dr. Warren's expert testimony will assist the jury.

Having found that the three-prong analysis of Rule 702 as explained in *Daubert* and its progeny has been established, I do not exclude Dr. Warren as an expert in this case.

3. Plaintiffs' Motion to Exclude OSHA File

Plaintiffs seek to exclude references to the OSHA investigative file, including the OSHA Report issued following Mr. Moncrieffe's accident (hereinafter, the "OSHA file" or "Report"). Public records are generally admitted under the exception to the hearsay rule, "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803 (8). The OSHA file is a public record and thus falls within ambit of Federal Rule of Evidence 803(8). Plaintiffs nonetheless seek to exclude is as untrustworthy.

In this case, the names of the OSHA investigators and all witnesses have been redacted from the subject file. However, due to a redaction mistake, Mr. Pedro Diaz, one of the two individuals who first responded to the scene, is identified in one part of the report. Mr. Diaz allegedly reported to the investigators that Mr. Moncrieffe was not wearing a seatbelt. Other unidentified witnesses reportedly stated that they have seen employees, including Mr. Moncrieffe, use the Bobcat 320 without fastening the seatbelts; these witnesses did not comment as to whether Mr. Moncrieffe was wearing a seatbelt at the time of the accident. Mr. Moncrieffe has always testified that he was wearing his seatbelt at the time of the accident, and Mr. Pedro Diaz, in his deposition, testified that Mr. Clifford was wearing his seatbelt, and denied ever telling OSHA investigators that he did not have to unbuckle him at the scene of the accident. According to Mr. Diaz, the statements attributed to him on the OSHA report are inaccurate. As a result, Plaintiffs request that the report be excluded as untrustworthy and because substantial prejudice will outweigh any

probative value. Moreover, the investigator's initial conclusion that Mr. Moncrieffe was probably not wearing a seatbelt was later rejected by OSHA based on additional evidence it obtained. Thus, Plaintiffs argue that the a conclusion which has been withdrawn cannot be introduced at trial.

Defendant responds that the OSHA file is trustworthy and should therefore be admitted. First, Plaintiffs can dispute the statement attributed to Mr. Diaz through the testimony of Mr. Diaz and Mr. Moncrieffe. Second, Plaintiffs can explain that OSHA later withdrew its conclusion that Mr. Moncrieffe was probably not wearing a seatbelt. According to Defendant, Plaintiffs' argument are directed to the weight that the jury should give to the OSHA file, and not to its admission.

In *Hines v. Brandon Steel Decks, Inc*., 886 F.2d 299 (11th Cir. 1989) the Court reversed the district court's order excluding portions of an OSHA report because it had done so by applying the standard from *Rainey v. Beech Aircraft Corp.,* 827 F.2d 1498 (11th Cir. 1987), *aff'd in part and rev'd in part*, 488 U.S. 153 (1988), which focused on "opinions" and "conclusions" versus "statements of fact." In remanding the case to the district court, the Eleventh Circuit explained that the *Rainey* standard had been reversed by the Supreme Court. *See Rainey,* 488 U.S. 153 (1988). The Eleventh Circuit instructed the district court to guide its determination of admissibility by the Supreme Court's decision in *Rainey*, which held that a "trial judge has the discretion, and indeed the obligation, to exclude an entire report or portions thereof-whether narrow 'factual' statements or broader 'conclusions'-that []he determines to be untrustworthy. Moreover, safeguards built in to [sic] other portions of the Federal Rules, such as those dealing with relevance and prejudice, provide the court

with additional means of scrutinizing and, where appropriate, excluding evaluative reports or portions of them." 488 U.S. at 165. The Eleventh Circuit also noted that "the OSHA investigator stands in a unique position because federal law generally prohibits him or her from testifying in private civil litigation. While the inability to cross-examine the investigator cannot per se invalidate the report as Rule 803(8) does not depend on the availability of the declarant, it is nonetheless a proper factor to take into consideration when deciding trustworthiness." *Hines,* 886 F.2d at 303 (internal citations omitted) (citing *Wilson v. Attaway*, 757 F.2d 1227, 1245 (11th Cir.1985) (report excluded for a variety of reasons including failure to afford possibility of cross-examination).

In reversing the Eleventh Circuit's decision in *Rainey,* the Supreme Court cited to the Advisory Committee Notes to Evidence Rule 803, which states that in determining whether a public record is trustworthy, the following factors should be considered: "(1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation." *Id.* at 168, n. 11. The district court should decide whether the "investigator's 'expertise' includes that necessary to decide questions of agency and whether this factor goes to the admissibility of the report or merely to its weight." Hines, 886 F.2d at 303. The fact that no hearing was held in making a report might affect its trustworthiness. *Id.*

On remand, the *Hines* court applied the Supreme Court's standard from *Rainey* and excluded portions of the OSHA report as untrustworthy. *Hines v. Brandon Steel Decks, Inc.,* 754 F. Supp. 199 (M.D. Ga. 1991). The district court found that conclusions and opinions within the report were untrustworthy for the following reasons: (1) OSHA

investigator did not have the necessary expertise to decide legal issues of agency; (2) investigator had no first hand knowledge and gathered information without holding a hearing; (3) the plaintiff was not, and is not, afforded an opportunity to cross-examine the OSHA investigator who prepared the report, since federal law prohibits OSHA investigators from testifying in private civil litigation. *Hines,* 754 F. Supp. at 200-01.

Plaintiffs in this case argue that the OSHA file is untrustworthy for the same reasons as in *Hines*: (1) the identity of the OSHA investigators has been concealed, making it impossible for the Court to determine their expertise; (2) investigators had no personal knowledge and no hearing was held before the Report was issued; (3) Plaintiffs have not had a chance to depose the investigators, nor will they have a chance to cross-examine them at trial; and, (4) the investigation took place five days after the accident, and the photos included in the file are of a different machine, at a different site, on a different date. Plaintiffs further argue that the following additional factors make the report untrustworthy: (1) the Report is highly redacted, with the exception of the inadvertent failure to redact Mr. Diaz's name in one instance[8]; (2) the Report contains hearsay statements amounting to double hearsay, and the second level of hearsay statements do not fall within an exception; (3) OSHA withdrew its seatbelt violation on the ground that evidence available did not sustain the violation as alleged; and, (4) Mr. Diaz has testified that the Report

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[8] Plaintiffs cite to *Ferguson v. Bombardier Servs. Corp.*, 244 Fed. Appx. 944, 950 (11th Cir. Fla. 2007) for its position that heavily redacted reports are unreliable. However, the report in *Ferguson* contained redactions of findings and conclusions, where the redactions in this case are only of the witnesses and investigators' names. Nonetheless, the fact that names of declarants have been redacted, makes it impossible to attribute the statements to any specific person or to give Plaintiffs the opportunity to depose these declarants or call them as witnesses during trial.

inaccurately attributes to him a statement he did not make.

Defendant responds that while the *Hines* Court excluded opinions and conclusions, it admitted into evidence specific findings of fact. The problem with Defendant's argument is that the statements it seeks to introduce are not statements of fact– they are hearsay and speculative statements such as unidentified co-worker's statements that "I probably have seen them without a seatbelt"; and, "Sometimes I wear a seatbelt; sometimes I don't. I have never been reprimanded for not wearing a seatbelt."[9] In addition, the previous standard distinguishing opinions and conclusions from statements of facts has been replaced by the "trustworthy" standard. *Rainey,* 827 F.2d 1498 (11th Cir. 1987), *aff'd in part and rev'd in part*, 488 U.S. 153 (1988).[10]

Reviewing the five recognized factors to determine trustworthiness, four weigh in favor of no admissibility: (1) the investigators possessed no personal knowledge and issued the Report without holding a hearing; (2) the skill or experience of the investigators is unknown since the identify of the investigators has been concealed; (3) there is no opportunity to depose or cross-examine the OSHA investigators, or any of the witnesses whose names have been redacted; and, (4) investigators visited the site five days later,

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[9] These statements are irrelevant to the issue of whether *Mr. Moncrieffe* was wearing a seatbelt *the day of the accident.* While they might support a violation issued against the employer, the employer's negligence in not reprimanding workers for not using a seatbelt is not an issue in the case.

[10] Further, its papers seem to indirectly concede that the later withdrawn conclusion that Plaintiff was not wearing a seatbelt is inadmissible. *See* Response, DE 277 at p. 6 ("[A]pplication of *Hines* in this case supports, at a minimum, introduction of the portions of the OSHA report dealing with specific findings of fact."). Even if Defendant does not concede this point, I conclude that the Report cannot be admitted into evidence to establish the very conclusion that OSHA later withdrew.

inspected a different machine, and took pictures of a different site.[11] Moreover, the Report contains hearsay statements made by unidentified third parties, and "[s]tatements made to a public investigator do not become immune to the hearsay rule by virtue of the fact that the investigator records them in writing." *Williams v. Asplundh Tree Expert, Co.,* Case No. 05-479, 2006 WL 2868923, *4 (M.D. Fla. Oct. 6, 2006) (citing *United States v. Pagan-Santini*, 451 F.3d 258, 264 (1st Cir.2006); *United States v. Mackey*, 117 F.3d 24, 28 (1st Cir.1997) ("In line with the advisory committee note to Rule 803(8), decisions in this and other circuits squarely hold that hearsay statements by third persons ... are not admissible under this exception merely because they appear within public records.")). Taking all factors into consideration, I conclude that the OSHA file is not trustworthy as required under the hearsay exception, and may not be admitted into evidence as part of Defendant's case in chief. Therefore, Plaintiff's Motion to Exclude the OSHA investigative file is granted.

Nonetheless, as discussed during oral argument, I do not foreclose the possibility that if Mr. Diaz testifies at trial, the statement explicitly attributed to him may be admitted as extrinsic evidence of a prior inconsistent statement for the purpose of impeachment. *See* Fed. R. Civ. P. 613(b) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."). Whether this statement will be

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[11] On the other hand, there is no evidence of bias at the time the OSHA Report were prepared.

admissible under Rule 613(b) is an issue that must be argued and determined at trial, if necessary.

4. Defendant's Motion to Preclude Other Accidents of Bobcat Compact Excavators

Defendant seeks to prevent Plaintiffs from disclosing five other accidents involving tipovers of Bobcats 320 resulting in crush injuries that Plaintiffs allege are substantially similar to the one at issue because they are not in fact substantially similar and, alternatively, because their probative value is substantially outweighed by its potential prejudice. The five accidents at issue involved the following individuals: Collins, Jones, Morgan, Rapich and Pritz. Plaintiffs intend to introduce four of these accidents to establish notice, and all five to rebut Defendant's defense that a properly seatbelted operator cannot sustain the type of crush injuries that Mr. Moncrieffe suffered.

In the Eleventh Circuit, when a party seeks to admit "prior accidents or occurrences involving the opposing party, in order to show, for example notice, magnitude of the danger involved, the party's ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care, and causation," the doctrine of "substantial similarity" applies. *Tran v. Toyota Motor Corp.*, 420 F.3d 1310, 1316 (11th Cir. 2005). The doctrine was developed by courts as a limitation to the admissibility of prior accidents or occurrences "[i]n order to limit the substantial prejudice that might inure to a party should these past occurrences or accidents be admitted into evidence." *Id.* "This doctrine applies to protect parties against the admission of unfairly prejudicial evidence, evidence which, because it is not substantially similar to the accident or incident at issue, is apt to confuse or mislead the jury." *Id.; Heath v. Suzuki Motor Corp.*, 126 F.3d 1391, 1395 (11th Cir. 1997) (same). The proponent of the evidence has the burden of showing the substantial

similarity among the accidents. *Pinchinat v. Graco Children's Prods*., Case No. 04-252, 2005 U.S. Dist. LEXIS 37181 (M.D. Fla. Apr. 7, 2005) (granting defendant manufacturer's motion in limine to exclude evidence of other accidents where there was no evidence submitted to the Court which satisfies the substantial similarity doctrine; "[t]he mere fact that plaintiff's expert may have relied upon these accidents in formulating an opinion is not sufficient to make the accidents themselves admissible").

In order for a prior incident to be admissible under this doctrine (1) conditions substantially similar to the occurrence in question must have caused the prior accident; and (2) the prior accident must not have occurred too remote in time. *See, e.g., Jones v. Otis Elevator Co*., 861 F.2d 655, 662 (11th Cir. 1988) (internal citations omitted); *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 650-1 (11th Cir. 1990) ("[B]ecause of the potential prejudicial impact of prior occurrences or accidents, such evidence is only admissible if conditions substantially similar to the occurrence caused the prior accidents, and the prior incidents were not too remote in time."); *Wright v. CSX Transp.*, Inc., 375 F.3d 1252, 1260 (11th Cir. 2004) ("Evidence of a similar past occurrence may be introduced if the conditions of the past incident are similar enough to those of the current incident and if the past incident was not too remote in time."). Determining the remoteness of evidence is within the trial judge' s discretion. *Jones,* 861 F.2d at 662 (citing *Keyes v. School Dist. No.* 1, 521 F.2d 465 (10th Cir. 1975), cert. denied, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976)). Courts have held that evidence of other accidents is not probative where there is a "necessity for a considerable amount of extrinsic evidence to determine whether the incidents were sufficiently similar to meet the standards of Fed. R. Evid. 403." *Wilson v.*

Bicycle S., Inc., 915 F.2d 1503, 1510 (11th Cir. 1990). Where an alleged prior incident is settled out of court, its cause has not been determined. *Id*. at 1510 n.10.

This case involves an allegation that the Bobcat 320 compact excavator is defectively designed because it does not properly protect operators from crush injuries in the case of a lateral tipover. Plaintiffs theory is that regardless of how the accident occurred, Defendant had a duty to protect the operator from crush injuries to their lower extremities. Defendant intends to raise the affirmative defense of comparative negligence. As already discussed, I do not decide the issue related to the availability of the comparative negligence defense in a crashworthiness case in a motion *in limine*. Nonetheless, as discussed at length during oral argument, the cause of the tipover is not particularly relevant to the substantial similarity inquiry for purposes of whether Defendant had notice that the injury was possible and to rebut the defense that the leg and/or foot of a properly seatbelted operator cannot extend outside the main compartment. Rather, the relevant factors to determine substantial similarity in this case are: (1) the model of excavator used; (2) whether the accident involved a lateral tipover; (3) whether the operator was wearing a seatbelt when the tipover occurred; and, (4) whether the operator suffered crush injuries to his lower extremities because his leg/foot extended outside of the main compartment. As such, prior incidents involving the Bobcat 320 in which a seatbelted operator was involved in a lateral tipover and, because his foot and/or leg extended outside the house, suffered a crush injury, which are not too remote in time, are admissible under the doctrine of substantial similarity.

Defendant concedes that none of the five accidents at issue are too remote in

time,[12] and that the fact that these cases settled does not affect their admissibility for the limited purposes that Plaintiffs propose. (June 11 Hr'g Tr.). Further, Defendant agrees that whether the Bobcat 320 tipped laterally to the right or to the left is of no sequence. (*Id.*). It is also undisputed that, just like Mr. Moncrieffe's accident, the accidents involving Collins, Jones, and Morgan involved a Bobcat 320 which tipped over laterally resulting in crush injuries to the operator's lower extremities because the operator's legs extended outside the machine's house despite the fact that the operator was wearing a seatbelt. Since all the relevant factors of these accidents are the same as in Mr. Moncrieffe's, I find substantial similarity among them and deny Defendant's motion as to these prior accidents.

As to the Rapich and Pritz accidents, I conclude that, at this time, Plaintiffs have not met their burden of establishing substantial similarity. Specifically, it appears that Rapich was operating a Bobcat 322 rather than a Bobcat 320, and Plaintiffs have not established that the differences between these two models are immaterial. As to Pritz, it appears that he was not wearing a seatbelt at the time of the accident, and the injuries suffered by Pritz as a result of the tipover are unknown. Without these facts, I cannot find that the incidents involving Rapich and Pritz are substantially similar to the accident at issue in this case. Thus, the motion is granted as to the Rapich and Pritz accidents.

During oral argument, Plaintiffs explained that they received Pritz' deposition the day before the hearing and had not had an opportunity to review the entire document, nor had they had an opportunity to speak to Defendant's counsel about it. The parties were also

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[12] Plaintiff's accident occurred on December 18, 2002. The other accidents occurred between June 1999 and April 2004.

not able to discuss whether the differences between the Bobcat 320 and Bobcat 322 models were significant. For these reasons, this Order does not preclude Plaintiffs from offering the Rapich and Pritz accidents if they can establish that, based on the newly received information, the differences between the two Bobcats are immaterial, and that Pritz was in fact wearing a seatbelt and received crush injuries. Whether these accidents are ultimately admissible will also depend on the purpose the evidence is offered to show. As to Pritz, since the accident occurred five months after Mr. Moncrieffe's, the accident cannot be introduced to show notice, as "notice" can only be established through prior accidents that predate the one at issue in the case.[13]

5. Defendant's Motion Regarding ISO 3471 and ISO 12117

Defendant seeks to exclude mention, discussion, or introduction by any witness[14] of two International Safety Standards: (1) ISO 3471 Earth Moving Machinery – Roll Over Protective Structures – Laboratory Tests and Performance Requirements; and, (2) ISO 12117 Tipover Protection Structure (TOPS) for compact excavators – Laboratory Tests and Performance Requirements. (*See* Response to Motion Regarding ISO Standards, DE 300

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[13] During the oral argument the Court and the parties engaged in preliminary discussions regarding how the evidence would be introduced at trial, and how it would be used. This order does not resolve that question. Therefore, my ruling does not preclude Defendant from objecting at trial as to the manner that Plaintiffs attempt to introduce the evidence.

[14] According to Defendant, Jeffrey Warren will attempt to testify that Defendant violated these standards when it designed and manufactured the Bobcat 320. Plaintiffs have explained that these standards will be introduced as evidence of negligence, but that they are not seeking a claim of negligence *per se* and will not request jury instructions to that effect. I note that the arguments in the motion seeking to exclude Vaughn Adams from discussing the standard is moot since Plaintiffs have withdrawn Mr. Adams from their list of expert witnesses.

at Ex. A & B). Defendant seeks to exclude these standards as irrelevant, not probative, and highly prejudicial. As to ISO 3471, Defendant argues that the standard is irrelevant because it does not apply to compact excavators. Specifically, the standard contains a "Scope" section listing the types of machines it applies to, such as "backhole loaders", and does not mention compact excavators. As to the "Scope" of ISO 12117, the standard states that "[i]t applies to compact excavators (as defined in ISO 6165) with swing type boom, having an operating mass of 1000 kg to 6000 kg," and Defendant argues that the Bobcat 320 does not fall within this definition.

Defendant relies on two cases from other courts to support its argument that standards that do not apply to the machine at issue are inadmissible as irrelevant. *See Ruffiner v. Material Serv. Corp.,* 506 N.E.2d 581 (Ill. 1987) (holding that standards plaintiff sought to introduce were not relevant because, by their terms, they were applicable to fixed ladders, and the case involved a special retractable, moving ladder); *MacCuish v. Volkswagenwerk A. G.,* 22 Mass. App. Ct. 380, 389 (Mass. App. Ct. 1986) (holding that trial court erroneously admitted the Federal Motor Vehicle Safety Standard 217 because it was a performance standard for buses, not vans; but the error was harmless).

In response, Plaintiffs argue that these standards were the only ones relevant to the ROPS/TOPS structures promulgated at the time the Bobcat 320 was designed, and as such, they are relevant. *See Lollie v. Gen. Motors Corp.,* 407 So.2d 613 (Fla. 1st DCA 1981) ("At issue in this case was the manufacture and design of the automobile fuel tank. The only minimum standard promulgated by the federal government regarding performance of the fuel tank was FMVSS 301. Accordingly, the standard was relevant to

the issue of fuel tank security.").[15] Alternatively, even if the standards would not normally be relevant as to the Bobcat 320, Defendant has made them applicable for several reasons. First, the placard displayed on the machine at issue includes the following language: ROPS-Rollover Protective Structure ISO 3471 .... (TOPS) Tipover Protection Structure ISO 12117. (*See* Response to Motion Regarding ISO Standards, DE 300 at Ex. D). Second, the Operation and Maintenance Manual for the Bobcat 320, published by Defendant, states that: "The excavator has an operator canopy (ROPS/TOPS)... as standard equipment. An enclosed cab (ROPS/TOPS) is provided as an option. The ROPS/TOPS meets ISO 12117." (*Id.* at Ex. F). Third, Defendant's corporate representative has testified that it designed the ROPS/TOPS of the Bobcat 320 in compliance with these standards. (*Id.* at Ex. E). Therefore, even if the language of the standards excluded the Bobcat 320 from their scope, the standards are relevant because Defendant opted to make them applicable to the Bobcat 320 and represented that the machine was built in accordance with them. I agree.

Having decided that the standards are relevant, the question becomes whether relevant but voluntary safety standards are admissible. As to this issue, both the law of Florida and of the Eleventh Circuit clearly holds that voluntary safety standards promulgated by industry groups or private non-governmental testing organizations are admissible at trial in product liability cases. *See Johnson v. William C. Ellis & Sons Iron*

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[15] The facts involved the admissibility of a federal standard concerning fuel tank performance in frontal impact cases in a case involving a rear-end collision.

Works, Inc., 609 F.2d 820, 822 (5th Cir. 1979)[16] ("[S]afety codes and standards are admissible when they are prepared by organizations formed for the chief purpose of promoting safety because they are inherently trustworthy and because of the expense and difficulty involved in assembling at trial those who have compiled such codes."); *Johnson v. Carnival Corp.*, DE 136, Case No. 07-20147-UNGARO (S.D. Fla. Dec. 11, 2007) ("The mere fact that the guidelines ... do not have the force of law is inconsequential for admissibility purposes... Safety-related guidelines and other recommendations, even when non-binding, are often admitted to assist the trier of fact in discerning the standard of due care in negligence cases.") (citing *Munice Aviation Corp., v. Party Doll Fleet, Inc.,* 519 F.2d 1178, 1183 (5th Cir. 1975)); *Alderman v. Wysong & Miles Co.,* 486 So.2d 673, 679 (Fla. 1st DCA 1986) ("We are of the view that the evidence relating to ANSI standards was properly admitted by the trial court, since evidence of industry standards provided by private, voluntary organizations such as ANSI is generally considered relevant in a strict products liability action on the issue of alleged design defects, as well as to impeach expert testimony contrary to the promulgated standards.") (citing *Clement v. Rousselle Corp.*, 372 So.2d 1156 (Fla. 1st DCA 1979), *cert. den*., 383 So.2d 1191 (Fla.1980)); *Lollie v. Gen. Motors Corp.*, 407 So.2d 613 (Fla. 1st DCA 1981), *pet. for rev. den*., 413 So.2d 876 (Fla.1982)).

Other courts, including cases the Defendant has cited to, have also held that safety standards are admissible. *See Ruffiner,* 506 N.E.2d at 584 ("Evidence of standards

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[16] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

promulgated by industry, trade, or regulatory groups or agencies may be admissible to aid the trier of fact in determining the standard of care in a negligence action. Similarly, standards may be relevant in a product liability action in determining whether a condition is unreasonably dangerous... Moreover, evidence of standards may be relevant and admissible even though the standards have not been imposed by statute or promulgated by a regulatory body and therefore do not have the force of law."). In *Hohlenkamp v. Rheem Mfg. Co.*, 655 P.d 32 (Ariz. Ct. App. 1982), the Arizona Appellate Court explained:

> [S]afety standards are relevant, especially in design defect cases. In cases of defects in manufacture, the jury is frequently able to judge the defective item by comparing it to others similarly produced by the manufacturer. However, ... [a] design defect, by contrast, cannot be identified simply by comparing the injury-producing product with the manufacturer's plans or with other units of the same product line, since by definition the plans and all such units will reflect the same design. By reason of the nature of the case, the trier of fact is greatly dependent on expert evidence and industry standards in deciding whether a defect is present.
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> These codes were formulated by groups of experts in the conveyor designing and manufacturing field, and were approved by many organizations. They are likely to be more probative than a single learned treatise or an expert opinion, as they represent the consensus of an entire industry. There is no motive for the formulators to falsify, and there is no danger that the standards will be subsequently altered or incorrectly remembered by a witness. ... Given these guarantees of trustworthiness, we approve the admission of industry safety codes as substantive evidence on the strict liability issue of whether a product is in a 'defective condition unreasonably dangerous.

Id. at 37.

Here, the two standards at issue have been promulgated by the International Organization for Standardization ("ISO"), which is comprised of a worldwide federation of national standards bodies. (*See* Response to Motion Regarding ISO Standards, DE 300 at Ex. A & B). The standards are prepared through ISO technical committees, along with

governmental and non-governmental international organizations. (*Id.*). Drafts of the standards adopted by the technical committees are then circulated to others for approval, and publication as an International Standard requires approval by at least 75% of the voting member bodies of ISO. (*Id.*). Thus, under the law of this Circuit, they are trustworthy and relevant for the jury to discern the standard of due care and to decide whether the Bobcat 320 was defectively designed. The jury will not be instructed that a violation of the standards is a *per se* breach; rather, the standards will be one of the factors that the jury may consider. For this reason, Defendant's motion Regarding ISO 3471 and 12117 is denied.[17]

6. Defendant's Motion Regarding Post-Sale Failure to Warn

Defendant seeks to exclude any evidence and argument to support a post-sale warning theory, giving rise to negligence or strict liability against Defendant. According to Defendant, there is no such duty in Florida; therefore, any such evidence or argument would be irrelevant, immaterial and highly prejudicial to Defendant. Defendant concedes that Florida recognizes the duty to provide a point of sale warning as discussed in the Restatement (Second) of Torts. *See West v. Caterpillar Tractor, Co.,* 336 So.2d 80 (Fla. 1976) (adopting § 402A of the Restatement (Second) of Torts, which recognizes the duty to warn at point of sale). It argues, however, that there is no Florida law finding that a manufacturer has a post-sale duty to warn or adopting the Restatement (Third) of Torts which discusses such duty.

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[17] During oral argument, there was some discussion as to how the standards will be introduced. This order does not address that issue, which should be discussed during the final pretrial conference and during the trial period.

Plaintiffs respond that the motion should be denied because: (1) Florida recognizes the duty; and, (2) because the motion is an untimely and improper motion for summary judgment in disguise, since Defendant is seeking to dispose of an entire substantive claim through a motion in limine which was filed months after the deadline for filing dispositive motions expired. During oral argument, I expressed my concern that some of the motions before me seem to be summary judgment motions in disguise, and I agree with Plaintiffs that this is one of them. Nonetheless, because I find that Florida law recognizes a post-sale duty to warn, I deny the motion on that ground.

The Restatement (Third) of Torts has recognized a post-sale duty to warn, and Florida's Third District Court of Appeals, in *Sta-Rite Indus. v. Levey*, 909 So.2d 901 (Fla. 3rd DCA 2004), embraced the Restatement (Third) of Torts and the duty. *Id.* at 905 ("There is little argument that a jury question was also presented as to the liability of Sta-Rite in failing reasonably to warn the purchaser and users of the pool about the extreme danger presented by a failure properly to maintain the grate, particularly in the light of similar severe accidents which occurred both *before* and *after* the sale of the pump in question.") (citing Restatement (Third) of Torts: Products Liability § 10 (1998) ("One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.")). Defendant argues that since the Florida Supreme Court has not approved the Florida Third District Court of Appeals' adoption of the Restatement (Third) of Torts, I must conclude that there is no recognition of the post-sale duty to warn. However, Defendant overlooks the rule enunciated by the Eleventh Circuit that, "[i]n the

absence of definitive guidance from the Florida Supreme Court, we follow relevant decisions from Florida's intermediate appellate courts." *State Farm Fire & Cas. Co.,* 393 F.3d at 1231. As a federal court applying state law, I am "bound to adhere to decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise." *Silverberg,* 710 F.2d at 690 (citations omitted).

One of Florida's intermediate appellate courts has embraced the Restatement (Third) of Torts and has held that the post-sale duty to warn exists, and there is no persuasive indication that the Florida Supreme Court would decide the issue otherwise. In fact, the Florida Supreme Court recognized a post-sale duty to warn in a case decided prior to the publication of the Restatement (Third) of Torts. *See High v. Westinghouse Elec. Corp.,* 610 So.2d 1259, 1263 (Fla. 1992) ("We find that Westinghouse had a duty to timely notify the entity to whom it sold the electrical transformers, FPL in the instant case, once it was advised of the PCB contamination."). This is a strong indication that the Florida Supreme Court will decide the issue consistent with *Sta-Rite Industries* and, when given the opportunity, will adopt the duty from the most recent Restatement. For these reasons, Defendant's argument that a post-sale duty to warn does not exist in Florida is erroneous, and the motion should be denied.

In the alternative, Defendant attempts to distinguish this case from *Sta-Rite Industries* by arguing that the manufacturer in that case made a design change to its product between the time it sold the product that injured the plaintiff, and the plaintiff's accident. Specifically, the manufacturer added a new warning to the product after plaintiff

had purchased it, but did not warn plaintiff of the change. Unlike the manufacturer in *Sta-Rite Industries*, Defendant has made no changes or modifications to the Bobcat 320 since the sale of the excavator at issue in this case. The court in *Sta-Rite Industries,* however, relied on the Restatement (Third) of Torts: Products Liability § 10 (1998), which provides that "[o]ne engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning." The Restatement does not base the duty on whether the design was modified after the time of sale, and neither did the court. I therefore find that Florida courts have recognized the post-sale duty to warn as discussed in the Restatement (Third) of Torts.

Following oral argument, I instructed the parties to submit supplemental briefing on the issue of how many incidents trigger the post-sale duty. Defendant has notified the Court that its counsel has been unable to find any reported case in jurisdictions that recognize the duty in which the court has articulated the number of occurrences required for the duty to arise. On the other hand, Plaintiffs indicate that the §10 of Restatement is illustrative of the general guidance and that it provides that "[a] reasonable person in the seller's position would provide a warning after the time of sale if ...the seller knows or reasonably should know that the product poses a substantial risk of harm to persons..." Restatement (Third) of Torts, § 10(b)(1). Plaintiffs also point to cases in which one incident was sufficient to trigger the duty, *Esparza v. Skyreach Equip., Inc.,* 15 P.3d 188 (Wash. Ct. App. 2000) (one tipover accident and complaints about the product's liability is enough to allow the jury to decide if the evidence was sufficient to impose the post-sale duty to

warn), and even one case in which an appellate court determined that the jury had sufficient evidence to find a breach of the duty even where no evidence of other accidents was offered, because the manufacturer knew how its drilling machine was being used in the field and was therefore in a position to realize that such use might cause a serious accident, *see Simon v. Am. Crescent Elevator Co.,* 767 So.2d 64, 74-75 (La. App. 4th Cir. 2000). Florida recognizes the duty, and there are at least three other substantially similar incidents which resulted in the exact injury suffered by Mr. Moncrieffe following an alleged foreseeable tipover. I now find that these circumstances are sufficient to let the jury decide whether the evidence is sufficient to support a post-sale duty to warn claim against Clark.

IV. Order

The Court, being duly advised in the premises, for the reasons discussed above and at the hearing, it is hereby ORDERED AND ADJUDGED:

1. Plaintiffs' Motion Regarding Cause of Tipover [DE 242] is DENIED without prejudice.
2. Defendant's Motion to Bar Testimony of Jeffrey Warren [DE 246] is DENIED.
3. Plaintiffs' Motion to Exclude OSHA File [DE 247] is GRANTED as to introduction of the evidence in Defendant's case in chief. However, whether the statement attributed to Mr. Diaz may be admissible for impeachment will be determined at trial.
4. Defendant's Motion to Preclude Other Accidents of Bobcat Compact Excavator X320 [DE 250] is GRANTED as to the accidents involving Rapich and Pritz, and DENIED as to the accidents involving Collins, Jones, and

Morgan. Nonetheless, I do not foreclose the possibility that Plaintiff may produce evidence at a later time to establish that the Rapich and Pritz accidents are substantially similar and are therefore admissible.

5. Defendant's Motion Regarding ISO 3471 and ISO 12117 [DE 252] is DENIED. The issue of how the standards will be introduced will be discussed during the final pretrial conference, which has been scheduled for September 5, 2008 at 10:00 a.m.

6. Defendant's Motion Regarding Post-Sale Duty to Warn [DE 261] is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of July, 2008.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Chris M. McAliley
Counsel of record